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NO. 86-1632

UNITED STATES SUPREME COURT

October Term, 1987

MANFRED R. WETZEL,
Petitioner,

-vs-

ARIZONA STATE REAL ESTATE DEPARTMENT
Respondent,

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. IS THERE A CONFLICT BETWEEN THE ARIZONA COURT OF APPEALS DECISION APPROVING THE OFFENSIVE USE OF COLLATERAL ESTOPPEL AND PRECEDENTS OF THIS COURT?

2. DOES THE FACT INTENSIVE NATURE OF THE DISPUTE BETWEEN PETITIONER AND THE STATE OF ARIZONA MAKE THIS CASE UNSUITABLE FOR REVIEW UNDER THIS COURT'S CERTIORARI JURISDICTION?

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STATEMENT OF THE CASE

Petitioner, Manfred R. Wetzel, challenges a decision of the Arizona Court of Appeals affirming an order of the Arizona Real Estate Commissioner revoking his real estate broker's license.

The petitioner was licensed in Arizona both by the Real Estate Commissioner as a broker and by the Arizona Supreme Court as an attorney. Following petitioner's disbarment by the Arizona Supreme Court in 1984, the Real Estate Commissioner commenced an action to revoke his broker's license, based on the same acts which led to petitioner's disbarment, as set forth In the Matter of Wetzel, 118 Ariz. 33, 574 P.2d 826 (1978) and In the Matter of Wetzel, 143 Ariz. 35, 691 P.2d 1063 (1984), cert. denied, 469 U.S. 1213, 105 S.Ct. 1184, 84 L.Ed. 2d 331 (1985).

Following a hearing held in November of 1984, the Real Estate Commissioner entered an order, dated March 1, 1985, revoking petitioner's real estate broker's license. Petitioner appealed to the Superior Court of Arizona for Maricopa County, which affirmed the Commissioner's order on July 15, 1985. An appeal to the Arizona Court of Appeals followed which also affirmed the order of revocation. Wetzel v. Arizona State Real Estate Department, Ariz. , 727 P.2d 825 (App. 1986). The Supreme Court of Arizona denied a petition to review on November 4, 1986.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT BETWEEN THE ARIZONA COURT OF APPEALS DECISION APPROVING THE OFFENSIVE USE OF COLLATERAL ESTOPPEL AND PRECEDENTS OF THIS COURT.

The Arizona Court of Appeals in affirming the revocation of petitioner's real estate broker's license adopted as Arizona law Section 29 of the Restatement (Second) of Judgments. That section sanctions the defensive and offensive use of collateral estoppel by parties not involved in the prior litigation. The Court of Appeals decision rejected Arizona precedent which prohibited the offensive use of collateral estoppel. Wetzel v. Arizona State Real Estate Department, Ariz. , 727 P.2d 825 (App. 1986).

The Court of Appeals held that a party may use prior findings for offensive purposes subject to several conditions, of

which the most important is that the person against whom preclusion is sought had a full and fair opportunity to litigate the issue. Wetzel v. Arizona State Real Estate Department. The rule adopted by the Arizona Court of Appeals in this case is consistent with this Court's decision on the use of offensive collateral estoppel. Parklane Hosiery Corporation, Inc. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). See also, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971) (Approving the use of collateral estoppel defensively in a patent case).

There appear to be no cases which prohibit the application of collateral estoppel on federal constitutional grounds. Since the Arizona Court of Appeal's adoption of Section 29 of the

Restatement (Second) of Judgments does not raise a constitutional question, the petition for writ of certiorari should not be granted.

II.

THE FACT INTENSIVE NATURE OF THE DISPUTE BETWEEN PETITIONER AND THE STATE OF ARIZONA MAKES THIS CASE UNSUITABLE FOR REVIEW UNDER THIS COURT'S CERTIORARI JURISDICTION

Another factor makes this case unsuitable for review by petition for writ of certiorari. Since the legal standard adopted by the Arizona Court of Appeals is constitutional, the only question left for this Court is whether it was applied constitutionally. Under these circumstances, petitioner's entitlement to relief would rest on this Court's review of the factual determinations made by the Arizona Real Estate Commissioner and Courts.

The fact intensive issues which petitioner is requesting this Court to

adjudicate are whether the Real Estate Commissioner abused his discretion in refusing to allow petitioner to relitigate certain factual issues, and whether the State Bar of Arizona and Supreme Court afforded petitioner a full and fair opportunity to a hearing in his disbarment proceedings. In effect, petitioner is asking this Court to exercise appellate rather than certiorari jurisdiction. Such would be inappropriate exercise of the Court's certiorari jurisdiction over state courts. See, Rule 17, Supreme Court Rules, Title 28 U.S.C.

CONCLUSION

The petition for writ of certiorari should be denied. The Arizona Court of Appeal's decision adopted a collateral

estoppel rule which is consistent with decisions of this Court. Granting the petition for writ of certiorari would require this Court to evaluate factual determinations made by Arizona Courts and an administrative agency. Such determinations would not be a proper application of this Court's certiorari jurisdiction.

RESPECTFULLY SUBMITTED this 13th day of May, 1987.

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